



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 6, 1996

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
DeWitt C. Greer State Highway Bldg.
125 E. 11th Street
Austin, Texas 78701-2483

OR96-1395

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 40627 and ID# 100336.

The Texas Department of Transportation (the "department") received two related requests for information, one dated May 2, 1996 and one dated May 14, 1996. Upon receiving these requests, the department made some of the requested information available to the requestor. In response to the May 2, 1996 request, you timely sought our decision regarding the release of several personnel files. In your letter dated May 10, 1996 you ask whether two of these personnel files are excepted from disclosure in their entirety pursuant to section 552.103 of the Government Code and whether portions of the other personnel files are excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. You submitted a representative sample of the personnel files to this office for review.¹

By letter dated June 5, 1996 you notified us of changed circumstances that you believe affect the department's response to these two requests for information. You explain that the requestor filed an employment discrimination complaint with the Texas

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Human Rights Commission ("THRC") between May 10, 1996, the date of your request for our decision, and June 5, 1996. As of June 5, 1996 the department had not released some of the requested information to the requestor. The department had not released the personnel files because it was awaiting our decision with regard to release of the files. The department had not released other information because it had made specific arrangements with the requestor for her to obtain that information at a later date.² You now contend that all information the department has not released is excepted from disclosure under section 552.103 of the Government Code because the information relates to litigation that the department anticipates in connection with the requestor's THRC complaint.

Section 552.103(a) excepts from disclosure information relating to litigation to which the department is or may be a party. The department has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the department must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. In light of the temporal nature of the applicability of section 552.103(a) and the governmental body's duty to establish the applicability of the exceptions it claims, we believe the act requires a governmental body raising section 552.103(a) to provide this office with information about new and significant developments concerning litigation to which the governmental body is or anticipates being a party. Open Records Decision No. 638 (1996) at 3. Further, we believe that a governmental body must provide us with these updates concerning the litigation in a timely manner. *Id.*

You timely informed us that the requestor filed a THRC complaint. Therefore, we will evaluate your section 552.103 claim with this recent development in mind. The pendency of a THRC complaint indicates a substantial likelihood of litigation. *See* Open Records Decision No. 386 (1983). You have demonstrated, or it is apparent from our review, how most of the documents relate to this anticipated litigation. However, you have not demonstrated a relationship between the personnel files of Mary Harris and Gloria Preston and the anticipated litigation.³ Pursuant to section 552.103, the department may withhold the following information from disclosure: 1) the personnel files of Frances S. Willison, Mary H. Young, Billy S. Chance, Harvey English, Jolee Aylesworth, Richard Murr, Sandy Rials, and Jim Teltschik, 2) information responsive to category 2 of the May 2, 1996 request, and 3) information responsive to categories 3, 4,

²You have submitted to us for review the other information that the department has not released, specifically information responsive to category 2 of the May 2, 1996 request and information responsive to categories 3, 4, and 5 of the May 14, 1996 request.

³You have also referenced pending litigation to which two department employees are parties. *James L. Julian v. State of Texas, et al*, No. 95-000913 (153rd Dist. Ct., Harris County, Tex.). The personnel files of Mary Harris and Gloria Preston do not appear to be related to this pending litigation.

and 5 of the May 14, 1996 request.⁴ The department may not withhold the personnel files of Mary Harris and Gloria Preston under section 552.103 but may be required to withhold portions of these files pursuant to the other exceptions discussed below.

Sections 552.024(a) and 552.117(1) provide that current or former public employees may elect to keep private their home addresses, home telephone numbers, social security numbers, and family member information. You must therefore withhold this information for the employees named in the request if, at the time the department received the request for information, they had elected to keep this information private.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The social security numbers contained in the requested personnel files may be confidential by federal law and therefore excepted from disclosure under section 552.101. Amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990. Open Records Decision No. 622 (1994) at 2-3. Thus, if social security numbers found in the requested information were obtained or maintained pursuant to any such provision of law, the numbers are confidential and may not be publicly disclosed.

The requested personnel files also contain employees' W-4 forms. These forms are confidential under federal law. 26 U.S.C. § 6103; *see also* Open Records Decision No. 600 (1992) at 8-9. Consequently, the forms are excepted from disclosure under section 552.101.

One personnel file contains memoranda relating to the subject employee's medical condition and its effect on the employee in the workplace. We believe that Title I of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12111 *et seq.* (1990), controls the release of these memoranda. The ADA requires an employer to maintain information about the medical condition of an employee in a separate medical file that must be treated as a confidential medical record. *Id.* § 12112(d)(3)(B), (4)(C). The ADA provides for release of medical information only in limited circumstances to individuals charged with specific responsibilities. *Id.* § 12112(d)(3)(B). Thus, the memoranda should be released only in accordance with the ADA.

⁴We note that once all parties to litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable. Open Records Decision Nos. 551 (1990), 454 (1986). Further, once the litigation has concluded, section 552.103(a) is no longer applicable. Open Records Decision No. 350 (1982). If the department receives a request for this information when section 552.103(a) is no longer applicable, the department may, at that time, raise other exceptions to disclosure that may be applicable. In any event, portions of the personnel files are confidential by law, and, therefore, we urge the department to exercise caution in releasing the information from these files. *See* Gov't Code § 552.352.

Finally, you claim that some information in the personnel files is protected by a right of privacy under sections 552.101 and 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under common-law privacy, information may be withheld if:

- (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

We note the presence of financial information in the personnel files. This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 545 (1990), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to the state retirement system. Open Records Decision No. 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an optional benefits plan offered by the city or state. *Id.* We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. *Id.* at 10.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

Ms. Joanne Wright - Page 5

Ref.: ID# 40627, ID# 100336

Enclosures: Submitted documents

cc: Ms. Linda Punecky
Rt. 6, Box 810D
Alvin, Texas 77511
(w/o enclosures)